Supreme Court, U.S.
FILED

06-290 AUG 28 2006

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NO.

IN THE

Supreme Court of the United States

COY PHELPS,

Petitioner,

v.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH;
FEDERAL BUREAU OF INVESTIGATION;
BUREAU OF ALCOHOL TOBACCO AND FIREARMS;
SAN FRANCISCO POLICE DEPARTMENT;
CITY AND COUNTY OF SAN FRANCISCO;
STATE OF ISRAEL; AMERICAN CIVIL LIBERTIES UNION;
DIANNE FEINSTEIN; TOM GERARD; ROY BULLOCK;
DON SMITH, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: August 28, 2006

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QUESTIONS PRESENTED

Whether agents of a private corporation can be held civilly and criminally liable when they engage in a clandestine conspiracy with foreign agents to undermine the U.S. Constitution, The Republic of the United States and its laws, and to violate the rights of the citizens of the United States;

Whether the First Amendment is violated when agents of a private corporation conspire with foreign agents, and local, state, and federal officials to destroy the Aryan culture and the Christian religion in violation of 18 U.S.C. § 1091 *et seq.* and through the abuse of the judicial process;

Whether the petitioner suffered a miscarriage of justice when the government, and the courts, refused to release him from confinement after the government discovered undisputed, and uncontested, evidence that agents of a private corporation had "framed" him into prison solely because he exercised his First Amendment right to express his religious beliefs, political views, and philosophical ideologies on matters of public concern;

Whether a foreign government is still liable for damages after it has defaulted by refusing to appear, respond, and to defend itself after a legally valid service of process although the case was dismissed upon technical grounds by motion of the remaining respondents.

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CORPORATE DISCLOSURE

There is no corporate disclosure to make.

STATEMENT OF RELATED CASES

The United States District Court has related the following cases:

Phelps v. *Patel, et al.*, District Court No. C-02-2504, Appeals Court No. 05-15578, Supreme Court No. 05-1585; *Phelps* v. *County of Alameda, et al.*, District Court No. C-02-4740, Appeals Court No. 05-17213; *Phelps* v. *Anti Defamation League of B'nai B'rith et al.*, District Court No. C-04-2815, Appeals Court No. 05-17277; *Phelps* v. *Bornstein*, District Court No. C-05-2405; *Phelps* v. *Wieking*, District Court No. C-05-4553; *United States* v. *Phelps*, District Court No. CR-85-0899.

The District Court Order is attached as Appendix C, App. 4a.

PARTIES

All of the parties in this action are named in the caption.

OPINION BELOW

There are no published opinions for this case.

JURISDICTION AND AUTHORITY

The Superior Court for the State of California had jurisdiction under 42 U.S.C. § 1983. The case was removed to the United States District Court pursuant to 28 U.S.C. § 1442.

The United States District Court had jurisdiction under *Bivens* v. *Six Unnamed Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971); 28 U.S.C. § 1331, 28 U.S.C. § 1343 and 42 U.S.C. § 1988.

This court has jurisdiction under 28 U.S.C. § 2101 and Rules 10-14 of the Supreme Court rules.

STATEMENT OF THE ISSUES

The Respondents, in this action, entered into a conspiracy to destroy the Aryan culture and the Christian religion in violation of 18 U.S.C. § 1091 *et seq.* (Genocide) and 18 U.S.C. §§ 241-242 (Conspiracy), 18 U.S.C. § 1951 *et seq.* (Racketeering), and many other laws.

The Respondents violated the First, Fourth, Fifth, Sixth, and Ninth Amendment rights of the Petitioner when they conspired to frame him into prison simply because he exercised his First Amendment right to express his sincerely held shared religious belief, political views and philosophical ideologies.

The Respondents have admitted that the Petitioner was actually innocent of the crimes for which he was charged and have not disputed, contested, nor challenged the claim of actual innocence.

The facts are uncontroverted that the Respondents framed the petitioner and have not disputed any of his allegations.

The Respondents have conspired to keep the Petitioner incarcerated in Federal Prison solely because of his religious beliefs and teachings.

STATEMENT OF THE FACTS

1. The Petitioner was the pastor of a Christian church and the president of the non-profit corporation.

2. The Petitioner proselytized the Christian teachings taken from the scripture of the Christian Holy Bible.

3. The Petitioner taught that Gods People are White People and that non-whites were no better than animals and that Jesus taught that Jews were devils from hell and that the Jews were children (descendents) of Satan who had a goal of destroying Gods people.

4. The Petitioner proselytized this message through the publication of a monthly magazine, a bi-weekly newsletter, telephone messaging and commercial distribution.

5. Mayor Dianne Feinstein and the City and County Supervisors, formed an "Intelligence" division of the San Francisco Police Department which had the singular purpose of identifying citizens who expressed anti-jew sentiments and to take official action against those citizens to silence their expressions.

   The Intelligence Division was later ordered abolished, by the courts, as being unconstitutionally formed and having an unconstitutional purpose. The Intelligence Division did not dissolve, but, rather, changed its name and continued to operate with the same goals and objectives.

6. Mayor (now U.S. Senator) Feinstein sent an Intelligence Division police officer (Tom Dickson) and his partner, to the residence of the Petitioner. Dickson stated "Mayor Feinstein sent us to tell you to stop saying things about

the jews or else she will have you arrested and put in prison. You can say anything you want about niggers or anyone else, but if you continue to say anything about the jews, she will have you arrested and put into prison."

7. The Petitioner was subsequently harassed, threatened, and placed under surveillance by the police department because he expressed anti-zionist sentiments.

8. In 1985, the Petitioner was arrested on charges of bombing jew synagogues, jew homes, and other buildings.

9. The Petitioner protested and claimed that he was being "framed" by an international jew conspiracy.

10. The attorney for the Petitioner believed the Petitioner was insane because of the international jew conspiracy "delusion," and, thusly, entered a plea of Not Guilty by Reason of Insanity. The Petitioner protested, but eventually, in a compromise, entered a dual plea of not guilty - not guilty by reason of insanity.

11. The petitioner was examined by several psychiatrists for the defense, for the prosecution, and for the court. The Petitioner explained that he was being framed by an international jew conspiracy which involved the Anti Defamation League of B'nai B'rith, Mossad agents, the FBI, . . .

12. In 1992, local, state, and federal law enforcement officials raided the office of the Anti Defamation League of B'nai B'rith (ADL) in San Francisco, California and seized all of the records.

13. The seized records revealed that the ADL was engaged in domestic spying and terrorism against Aryans and Christians who expressed anti-zionist sentiments. The records revealed that the ADL took such action against this Petitioner.

14. The records revealed that the ADL had been acting in a conspiracy with local, state, and federal law enforcement officials, U.S. Attorneys, Judges, Politicians, Mossad agents of Israel, other zionist organizations, and members of Synagogues to destroy the Aryan culture and the Christian religion (of which the Petitioner is a class member).

15. The seized records revealed that the ADL, and other agencies and organizations qualified as racketeering enterprises under federal law.

16. The seized records revealed that agents of the ADL, who were also San Francisco police officers, committed the crimes of bombing jew synagogues, jew homes, and other buildings and then pointed to the Petitioner as the responsible suspect.

17. When the records were seized, these ADL agents fled to the Phillipine Islands to avoid arrest and prosecution and mailed in their retirement applications from the Phillipine Islands.

18. The seized records revealed that agents of the ADL had this Petitioner under twenty-four hour a day, seven days a week, surveillance and the surveillance records revealed that the Petitioner was home at the times of all crimes for which he was charged.

19. The seized records revealed that Mossad agents had office space inside the ADL business complex and that the Mossad agents were

unregistered foreign agents in the United States.

20. The seized records revealed that the ADL would spy on citizens who expressed anti-zionist sentiments, and collect information from other Jew organizations, and give the information to the Mossad agents who would transmit the information to its headquarters in Israel to be entered into a computer database that named enemies of Israel.

21. The seized records revealed that a San Francisco Police officer was also a FBI agent and a CIA agent who was working with Mossad agents to undermine the U.S. Constitution and the Laws of the United States. This San Francisco Police officer was also acting with Mayor Feinstein to destroy the Aryan culture and Christian religion.

22. The seized records revealed that the manager of the ADL (Richard Hirschhult) had receive money from Mossad agents to pay to Lieutenant Tom Gerard (of the Intelligence Division of the San Francisco Police Department) to form a death squad (assassins) to murder any person who expressed anti zionist ideologies (and the Petitioner was on the list.)

23. The seized records showed that the ADL, and the American Civil Liberties Union, and the Southern Poverty Law Center, jointly participated in activities to destroy the Aryan culture and the Christian religion and that these organizations worked together with Mayor Dianne Feinstein, the San Francisco Police Department, the County Supervisors of San Francisco, the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, Agents of Israel, and others to destroy anyone

who expressed anti zionist sentiments or ideologies.

24. The seized records revealed that Mossad agents had established a fraudulent bank account from which a U.S. Attorney would withdraw money to pay judges, politicians, and agents of the ADL for their clandestine activities against Aryans and Christians (including this Petitioner.)

25. The seized records revealed that the ADL had paid a Mossad agent to murder this Petitioner if the Petitioner had posted bail when he was arrested in 1985.

26. The seized records revealed that Dianne Feinstein, Tom Gerard, Roy Bullock, the ACLU, the SPLC, and agents of the FBI and the BATF received money from the ADL to destroy the Aryan culture and the Christian religion in violation of 18 U.S.C. § 1091 *et seq.*

27. The seized records revealed that the Petitioner was, undisputedly, "framed" by agents of the Anti Defamation League of B'nai B'rith who acted in conspiracy with others.

28. The ADL was arrested and appeared in the Superior Court for the State of California at San Francisco and admitted that it had engaged in domestic spying and terrorism against Aryans and Christians who expressed anti zionist sentiments, religious beliefs, political views, or philosophical ideologies and admitted that their goal was to destroy that Aryan culture and Christian teachings.

29. The ADL admitted that it acted in a conspiracy with foreign agents and local, state, and federal officials to destroy the Aryan culture and the Christian religion.

30. The ADL pled guilty and paid a financial sanction.

31. Petitioner filed a lawsuit against the ADL (and its conspirators) for framing him into prison simply because he exercised his First Amendment right to express his shared religious beliefs, political views, and philosophical ideologies on matters of public concern.

32. Petitioner charged the Respondents with racketeering and conspiracy to frame him into prison. None of the Respondents have ever denied the charges and none of the Respondents have ever raised a single challenge, protest, or argument against the charges nor have they disputed or contested any claims made against them.

33. The Petitioner attempted to serve the State of Israel through the "Directorate of Courts" with service of process but was unable to locate such an organization and no one, he contacted, had knowledge of the existence of any such organization.

34. The consulate of Israel, in San Francisco, stated that she was authorized to receive service of process for the State of Israel, thusly, she was served with the proper papers by a San Francisco County Deputy Sheriff officer who was not a party to the action.

35. The Respondent State of Israel refused to respond and refused to appear to defend itself. When the time to respond had expired, the Petitioner notified the State of Israel that it had defaulted and gave them 15 more days to respond and they still refused to respond. Even after a second extension of time, the State of Israel refused to respond and was in default.

Petitioner requested the Clerk of the court to enter a default judgment against the State of Israel and simultaneously made a motion to the court for a default judgment and served a copy to the State of Israel. The State of Israel still did not respond nor challenge the default motion.

36. The remaining Respondents did not deny any of the claims or allegations but moved to dismiss the complaint on technical grounds.

37. The court dismissed all parties (including the State of Israel) and dismissed the Complaint.

38. The court held that Heck v. Humphrey, 512 U.S. 477 (1994) applied to the case since a decision favorable to the Petitioner would invalidate the civil commitment. The court disregarded the facts of actual innocence admitted by the Respondents. The Petitioner argued that Heck applied only to convicted prisoners.

39. The court (mis) applied the case of U.S. v. Phelps, 283 F.3d 1176 (9th Cir. 2002) to its reasoning. Petitioner argued that the case did not apply because of the abuse of discretion of the court in making an erroneous decision. The essence, and history, of that case is as follows:

(a) Petitioner was a pastor of a church, in 1985, and proselytized anti zionist teachings.

(b) The Respondents conspired to frame him into prison after attempts to assassinate him failed.

(c) In 1992, uncontested evidence was discovered that he was framed by the Respondents in this case.

(d) The government still refused to release him because of his religious beliefs concerning anti-zionism.

(e) After much argument, he was released in 1999 but was placed on criminal probation conditions by the judge solely because she disagreed with his religion.

(f) The Petitioner contracted with an Internet Service Provider to host a Christian religious website that proselytized the Petitioner's anti zionist religious beliefs.

(g) The ADL viewed the website and contacted the Police Chief of that city and demanded that the Petitioner be arrested and that the website be removed merely because it was offensive to those who supported zionism. A review of the website did not reveal any unlawful writings.

(h) Police Chief Jerry Adams ordered the Internet Service Provider to remove the website from the Internet without any justification and without consulting any judicial officer.

(i) Police Chief Jerry Adams then instructed the U.S. Probation Officer to arrest the Petitioner because of the offensive religious writing on the Internet.

(j) On March 26, 2001, the Petitioner was in the San Francisco Federal building talking with his attorney on a civil matter when two unknown U.S. Marshals arrested the Petitioner. The Marshals did not know why they were arresting the petitioner and they did not possess a warrant.

(k) The Marshals took the Petitioner before U.S. Magistrate Judge Zimmerman for arraignment. Magistrate Zimmerman examined the documents presented to him and stated "There is nothing in this paperwork to tell me why this man is in my court."

(l) The paperwork contained a blank warrant form with no information added to it. The affidavit to support probable cause merely stated "see attachment."

(m) The attachment was five printed pages of the religious writings taken from the Internet (Five pages taken out of context with the other 70 pages.)

(n) No charges were in the paperwork. No nature of charges were given. No bill of particulars were presented. No information was given that would let anyone know why the Petitioner was arrested.

(o) Magistrate Zimmerman exclaimed "I'm not touching this case" and sent the case to the judge that ordered the arrest.

(p) The Petitioner was not charged; no nature of charges were given; no plea was given; no bail hearing was held; the Petitioner was taken before Judge Patel.

(q) Judge Patel angrily waved the papers in the air but did not charge the Petitioner. No bill of particulars were given; no plea was entered, no bail hearing held; the Petitioner was ordered to be taken to the Alameda County Jail to await disposition of the case.

(r) The Marshals took the Petitioner to the county jail and instructed the receiving officers to place the petitioner in the worse possible place in the jail because of his politically incorrect religious beliefs. The Petitioner was placed in conditions of confinement that were inhumane (Subsequently the court ordered the jail closed because of the conditions.)

(s) About 30 days later, while in jail, the Petitioner received a copy of a letter that a probation officer had written to Judge Patel in response to a letter written to him instructing him to investigate the Petitioner thoroughly in order to discover some kind of criminal activity that she could use to make the arrest lawful by expost facto application.

(t) The probation officer replied that he had diligently investigated the Petitioner but was unable to discover any unlawful activity.

(u) During his incarceration in the county jail, two deputy sheriff officers handcuffed his hands behind his back and beat him slamming his head against concrete walls. This caused the Petitioner to suffer a stroke (and subsequently another stroke.)

(v) Almost a year later, the Petitioner had a hearing. He was arrested under the provisions of 18 U.S.C. § 4243(g) and he prevailed over the arrest under that subsection so the judge sent him to prison anyway under subsection (f) ... which has no provisions for such action.

(w) Thirteen months after the arrest, the Ninth Circuit ruled on the appeal the Petitioner had made challenging the imposition of criminal probation conditions on a released civil commitment.

(x) The Ninth Circuit did not address any of the issues raised in the appeal. Instead, it addressed the issue raised in the arrest hearing (after the 2001 arrest.) The Ninth Circuit held that the Petitioner should not have been released anyway in 1999 because there was no official "certificate of recovery" attached to the release paperwork. (A legal insufficiency.)

(y) The treating doctors did not include a certificate of recovery because they had seen the evidence of the actual innocence of the Petitioner, and that the Petitioner was not under the jurisdiction of the provisions of the statute (which required the defendant to have committed a crime.)

(z) The doctors also stated to the court that they had seen the evidence that the Respondents, in this case, had actually framed the Petitioner into prison and that the Petitioner's claim of being framed in an international jew conspiracy was literally true. Therefore, he had never been mentally ill under the law, and since he had never been mentally ill, he could not recover from that which he did not suffer. He could not "recover" from a mental illness that he never had. That is why no certificate of recovery was included. It would have been inconsistent with their findings.

40. At the 2001 arrest hearing, the Assistant U.S. Attorney, and the U.S. Probation Officer admitted to U.S. Magistrate Zimmerman that the Petitioner

(a) Did not commit a crime,

(b) Did not violate any law,

(c) Did not violate any court order,

(d) Did not violate any probation condition,

(e) Did not conspire with anyone to commit a crime,

(f) Did not associate with anyone engaged in criminal activity, and

(g) Did not possess anything unlawful.

41. At the hearing, the Judge attempted to prove that the Petitioner was suffering from a mental illness. Two mental health professions for the government testified that the Petitioner exhibited no signs or symptoms of a mental illness. The doctors stated "If he is mentally ill, I don't know what it is. He is definitely not schizophrenic. I have been practicing psychiatry for over 40, years and I tell you he is not schizophrenic. If you (the judge and prosecutor) say that he is, I don't know what it is."

42. Judge Patel, and Prosecutor Bornstein, sent the Petitioner to prison anyway saying that his sincerely held shared politically incorrect religious beliefs was clear evidence of dangerousness.

43. Judge Patel ordered the Petitioner to be returned to prison for an "evaluation" to determine a release regimen (which under 18 U.S.C. § 4247(d) is 45 days).

44. The Bureau of Prisons misconstrued the order to be re-commitment, order and not a re-evaluation order. Five and one half years after the arrest, the Petitioner is still in prison.

WHY THIS PETITION SHOULD BE GRANTED

Tom Gerard was a Lieutenant of the Intelligence Division of the San Francisco Police Department for the City and County of San Francisco California.

Gerard was also an agent of the Central Intelligence Agency (CIA) and an agent of the Federal Bureau of Investigation (FBI) and a paid clandestine agent of the Anti Defamation League of B'nai B'rith (ADL).

Gerard worked with another agent of the ADL by the name of Roy Bullock, who also was a paid clandestine agent of the ADL and an unofficial paid agent of the FBI and the Bureau of Alcohol Tobacco and Firearms (BATF).

Agents of the ADL jointly participated with the FBI, the BATF, the American Civil Liberties Union (ACLU), the Southern Poverty Law Center (SPLC), and Mossad agents of the State of Israel in a conspiracy to destroy the Aryan culture and the Christian religion through domestic terrorism and abuse of the judicial process.

All of the above parties conspired jointly to undermine the U.S. Constitution, The Republic of the United States, the laws of the United States, and the rights of the citizens of the United States. The Respondents acted in a racketeering enterprise.

The above parties acted jointly in a conspiracy to assassinate the Petitioner, and when that failed, they conspired to "frame" him into prison by committing crimes themselves and to cause the Petitioner to be imprisoned for those crimes.

Seven years after the Petitioner was sent to federal prison, the government seized the records of the ADL office in San Francisco California and discovered undisputed and uncontested evidence that the Petitioner was actually innocent of the crimes for which he was charged and that he was, indeed, framed in an international jew conspiracy, but still refused to release him because of his politically incorrect religious beliefs, political views, and philosophical ideologies.

The ADL (as a corporation) was arrested and admitted to all the facts above in the Superior Court for the State of California at the County of San Francisco and paid a financial sanction.

When the records were seized, and the conspiracy to destroy the Aryan culture and the Christian religion exposed, Gerard fled to the Phillipine Islands to avoid arrest. A flight to avoid prosecution is prima facie evidence of guilt (see U.S. v. Chipps, 410 F.3d 438, 451 (8th Cir. 2005).

PRIVATE PARTY LIABILITY:

When the government has insinuated itself into a position of interdependence with a private party, it must be recognized as joint participation (Lugar v. Admundson Oil Company, 457 US 922, 941 (1982). When the government and a corporation strikes a deal whereby the government carrys out the corporations directions, both the government and the corporation are liable for damages (Adicks v. S.H. Kress Co., 398 U.S. 144 (1970). A corporation has no immunity (Brokens v. Gallaher, 287 F.2d 1302 (Nd. Fla. 2003).

The Anti Defamation League of B'nai B'rith have been jointly participating in law enforcement activities for decades so that it cannot claim the same protections as an anonymous caller nor as a

concerned citizen. It has been well recognized that the ADL has orchestrated law enforcement activities for decades.

SET INTO MOTION PRINCIPLE:

When the Anti Defamation League sets into motion a chain of events (or a series of acts) taken by others, the ADL is liable for the injuries suffered to a citizen even though the ADL did not participate in the injury or even had direct knowledge of the injury (Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir. 1978).) See U.S. v. Paladino, 401 F.3d 471, 479 (7th Cir. 2005). Person who conspires with others and sets into motion a train of events inflicting materalized injury upon others, cannot escape liability by quitting the conspiracy or being expelled from the conspiracy.

Agents of the ADL caused this petitioner direct injury by framing him into prison solely because he exercised his First Amendment right to express his religious beliefs. The ADL paid their agents to assassinate the Petitioner because of his religion.

DEFAULT JUDGMENT:

The State of Israel was properly, and timely, served with service of process by a San Francisco County Sheriff Officer who was not a party to the action through the Consulate at that city.

Although the plaintiff in a lawsuit against Israel is directed to serve papers on the "Directorate of Courts," no such organization could be discovered by anyone that this Petitioner contacted. Even the staff at the Bureau of Prisons could not locate the organization in any directory. Therefore, this Petitioner exercised his option expressed in Article 10 of the Convention to serve papers upon an authorized agent of Israel.

The Government of Israel did not respond, did not appear, and did not defend itself in any manner throughout the proceedings.

This Petitioner requested the court clerk to enter a default pursuant to Rule 55 of the Federal Rules of Civil Procedures. The Petitioner made motion to the court for a default judgment against the State of Israel. According to Rule 55(a) the clerk of the court is required to enter a default against the State of Israel even when no one has directed the clerk to do so.

The judge did not address the issue of the default nor offered any explanation for her decision to dismiss the case including all parties.

Whenever a person has been properly served and does not respond, they are in default (In Re Villegas, 132 BR 742, 744 (9th Cir. 1991) and no party in default is entitled to a Rule 55(b)(2) proceeding unless the party has first "appeared" in the action. (Wilson v. Moore and Associates, 564 F.2d 366 (9th Cir. 1977). When defendant in an action is given proper notice and do not show up to present a case on their own behalf, they must bear the consequences of a default (Nintendo of America Inc. v. Nidec Nintendo Electronics Co., 51 F.3d 281 (9th Cir. 1995).

The Petitioner served the State of Israel with a notice of default and the State of Israel was required to respond within 20 days (Local Rule 7.3(a)) and they did not. When the State of Israel has had a full and fair opportunity to respond to a complaint, and does not, the State of Israel cannot attack the default under a Rule 60(b) motion (In Re Harmon, 250 F.3d 1240, 1245-1247 (9th Cir. 2001).

ACTUAL INNOCENCE:

The Petitioner was charged with bombing of jew synagogues and jew homes in 1985. It was suspicious, at the onset, because none of the bombs attached to jew buildings detonated. Only the bombs of non-jew buildings exploded. If the Petitioner had constructed all of the bombs, as the prosecutor alleged, all of the bombs should have detonated.

One bomb was placed on the porch of the home of Senator (then Mayor) Dianne Feinstein. She stated that she discovered the bomb when she opened the door to collect the newspaper. However, the Mayor's home was under 24 hour surveillance by San Francisco police and none of the officers reported anyone in the area during the night before the bomb was discovered. It was theorized that she planted the bomb herself (which did not detonate) and then conspired with Gerard, and the ADL to point the crime to the petitioner since she had already threatened to put the petitioner into prison because of his religious beliefs and teachings.

The seized records of the ADL showed that the Petitioner was home during the time that this "crime" occurred.

It is undisputed and uncontested by the government, by the courts, and by the ADL that the Petitioner is actually innocent of the crimes for which he was charged. The seized records of the ADL clearly exonerates him of all suspicion, but, still, he is suffering incarceration because of his religion.

The petitioner is alleging a free standing actual innocence claim as well as a miscarriage of justice actual innocence claim.

A free standing is a claim of pure innocence and a miscarriage of justice claim of actual innocence is when their has been an error of constitutional

proportion that the courts cannot have confidence of the previous courts findings (Herrera v. Collins, 506 U.S. 390, 393 (1993); Schlup v. Delo, 513 U.S. 298 (1995); Murray v. Carrier, 477 U.S. 478 (1986). In these cases the evidence of actual innocence must be truly persuasive or probable. However, this case is free standing because the evidence has already been established and the ADL has pled guilty to framing the Petitioner into prison.

MALICIOUS PROSECUTION-ABUSE OF PROCESS-RACKETEERING-FALSE IMPRISONMENT

The abuse of the judicial process and malicious prosecution is the wrongful use of the judicial process (Blaxland v. Commonwealth Director of Public Prosecutions, 323 F.3d 1198, 1204 (9th Cir. 2003). A private entity who initiates, or procures, criminal proceedings against another who is not guilty, is subject to liability (id.).

Heck v. Humphrey, 512 U.S. 477, 484 (1994) requires that a person be found not guilty, or his conviction overturned, before he can bring a civil action.) In this case, the Petitioner has overcome Heck by being found not guilty.

The Respondents in this action conspired (18 U.S.C. §§ 241-242, 42 U.S.C. § 1985) to abuse the process and use the process for which it was not intended: to destroy the Aryan culture, the Christian religion, and anyone who expressed any anti zionist or anti jew sentiments. The Respondents engaged in racketeering activities to further that goal and received money from the racketeering enterprise to promote the agenda of destroying anyone who expressed any anti jew sentiments. The Respondents destroyed the church (business) of the Petitioner, its finances, its property, and its membership in violation of the racketeering laws (18 U.S.C. § 1951 *et seq.*).

The Respondents engaged in activities with the purpose of subverting the Republic of The United States and its laws in violation of 18 U.S.C. § 2383 *et seq.*

The Respondents caused the malicious arrest, prosecution, and imprisonment of the Petitioner and caused him irreparable injury, in violation of Wayte v. U.S., 470 U.S. 598, 608 (1985) (no person can be arrested and prosecuted solely because of his religion.)

SUMMARY AND CONCLUSION

The Respondents conspired to frame the Petitioner into prison solely because he exercised his First Amendment right to express his religious beliefs. The ADL admitted to it in open court. The government, and the courts, know that he is actually innocent and still will not release him causing a miscarriage of justice.

The Respondents engaged in activities to subvert the Republic of the United States and to violate the rights of its citizens. The Respondents conspired to destroy anyone who expressed anti zionist sentiments and they conspired to destroy the Aryan culture and the Christian religion. They abused the process to accomplish that purpose. Case law is replete of actions in which the ACLU has the singular purpose of destroying the Christian Religion and the Aryan culture.

All of the allegations in the civil rights complaint against the Respondents have not been disputed, contested, or denied by any of the Respondents.

The State of Israel has buried its head in the sand and ignored the whole action hoping that it would magically disappear. The State of Israel defaulted and the Petitioner is entitled to a default judgment and

compensation regardless of the effect on the case for the other Respondents.

The ADL, and the other Respondents, engaged in domestic terrorism against Aryans and Christians.

The ADL caused the false and malicious arrest, prosecution, and imprisonment of the Petitioner in this case.

For the case stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/ COY PHELPS
COY PHELPS 78872-011
In Pro Se
FMC-Devens
P.O. Box 879
Ayer, Massachusetts 01432

CERTIFICATION

I, COY PHELPS, certify under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I am the Petitioner in this action and that all the statements made herein are made by me and that all the statements are true and correct according to my best knowledge and belief.

/s/ COY PHELPS
COY PHELPS 78872-011
In Pro Se

Dated: August, 2006

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COY PHELPS*,

Plaintiff - Appellant,

V.

ANTI DEFAMATION LEAGUE OF B'NAI RITH; et al.,

Defendants - Appellees,

And

UNITED STATES OF AMERICA; et al.,

Defendants.

No. 05-17277
D.C. No. CV-04-02815-MHP

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 06/09/06

* The Ninth Circuit, on its own authority, added the United States of America as a party and I (Coy Phelps) object to that.

APPENDIX B

FILED
JUN 09 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COY PHELPS,	No. 05-17277
Plaintiff – Appellant,	D.C. No. CV-04-02815-MHP
v.	MEMORANDUM*
ANTI-DEFAMATION LEAGUE; et al.,	
Defendants – Appellees,	

Appeal from the United States District Court
For the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Submitted June 5, 2006**

Before: CANBY, T.G. NELSON and KLEINFELD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

A review of the record and the opening brief indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam)(stating standard). Accordingly, appellees' motion for summary affirmance of the district court's judgment is granted.

AFFIRMED.

APPENDIX C

FILED
FEB - 8 2006
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RELATED CASE ORDER

A Notice of Related Cases has been filed that the following cases are related with the meaning of Crim. L.R. 8-1(b):

CR 85-899 MHP USA –v- Phelps
C02-2504 PJH Phelps –v- Judge Marilyn Hall Patel et al.
C02-4740 PJH Phelps –v- County of Alameda et.al.
C04-2815 MHP Phelps –v- Anti-Defamation League of b'Naith B'Rith et.al.
C05-2405 MHP Phelps –v- Bornstein
C05-4553 MHP Phelps –v- Wieking

ORDER

The time for filing a statement to support or oppose the Notice has passed. On the basis of the material submitted to the Court, as the Judge assigned to the earliest filed case, I find that the cases:

[ ] ARE NOT RELATED as defined by Crim. L.R. 8-1(b).

[ ] ARE RELATED as defined by Crim. L.R. 8-1(b). I find, however, that reassignment to me of the

action(s) currently assigned to another judge is not warranted.

[✓] ARE RELATED as defined by Crim. L.R. 8-1(b). Pursuant to Crim. L.R. 8-1(e), the Clerk of Court is ordered to reassign the later-filed action to the undersigned. Counsel are instructed that all future filings are to bear the initial MHP immediately after the case number. All matters presently scheduled for hearing in the reassigned case(s) are vacated and must be renoticed for hearing before the undersigned.

DATED:

/s/
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on the date stated below, I lodged a copy of this order with each judicial officer and I mailed a copy to each counsel of record in the cases listed above.

Richard W. Wieking, Clerk

DATED:

By: Valerie Kyono
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS
Petitioner

Case: C-05-2815-MHP

-v-

NOTICE OF APPEAL

ANTI DEFAMATION LEAGUE OF B'NAI B'RITH, et. Al.
Respondents

PLEASE TAKE NOTICE

That the above Petitioner will appeal to the 9th Circuit U.S. Court of Appeals from the final ORDER and JUDGMENT of U. S. District Court Judge Marilyn H. Patel issued on December 22, 2005 in the above court for the above case.

DATE: 12-21-2005

/s/ Coy Phelps In Pro Se
COY PHELPS 78872-011
FMC-DEVENS
P.O. BOX 879
AYER, MASSACHUSETTS
01432

APPENDIX E

ORIGINAL
FILED
DEC 22 2005
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS,

Plaintiff,

v.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; et al.,

Defendants.

_____/

No. C 04-2815 MHP (pr)

JUDGMENT

The first amended complaint is dismissed without leave to amend for failure to state a claim upon which relief may be granted. Judgment is now entered in favor of all defendants and against plaintiff.

IT IS SO ORDERED AND ADJUDGED.

DATED: December 21, 2005

/s/
Marilyn Hall Patel
United States District Judge

APPENDIX F

ORIGINAL
FILED
DEC 22 2005
RICHARD W. WIEKING
CLERK U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS, No. C 04-2815 MHP (pr)

Plaintiff, **ORDER OF DISMISSAL**

v.

ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH; et al.,

Defendants.
_____/

In an October 24, 2005, Order, the court granted several defendants' motions to dismiss and dismissed the action against those defendants. The court noted that there were four other defendants who had not been served with process and/or had not entered an appearance in the action. Specifically, service of process apparently had not been accomplished as to defendants Roy Bullock, Tom Gerard and Don Smith. A fourth defendant, the State of Israel, had not entered an appearance although the court had not determined whether that defendant had been properly served with process.

The court notified plaintiff in the October 24, 2005 Order that it intended to decide with regard to the four remaining defendants whether the action would be dismissed under Federal Rule of Civil Procedure

12(b)(6) for failure to state a claim upon which relief may be granted. Oct 24, 2005 Order, p. 24. The court explained that:

> it appears that the court's rulings in this order [apply] with equal force to the claims asserted against the four non-appearing defendants. Specifically, (a) claims concerning the arrest, prosecution and trial of Phelps appear to be barred by Heck, the collateral estoppel doctrine and the statute of limitations and (b) claims concerning information obtained in 1992 or 1993 from the raid on the ADL offices and defendants' residences appear to be barred by Heck and the collateral estoppel doctrine insofar as they allegedly show Phelps' innocence of the bombing and by the statute of limitations.

Oct. 24, 2005 Order, p. 24. The court also notified plaintiff that it intended to decide with regard to defendants Bullock, Gerard and Smith whether the complaint would be dismissed under Federal Rule of Civil Procedure 4(m) for failure to timely serve process on these defendants. Oct. 24, 2005 Order, p. 25. The court gave Phelps an opportunity to show cause why the court should not take such actions: "No later than December 2, 2005, plaintiff must file and serve any opposition/response to the court's intent to sua sponte determine whether the first amended complaint states a claim for relief against any of the non-appearing defendants. And no later than December 2, 2005, plaintiff must file and serve his response regarding service of process on defendants Gerard, Smith and Bullock." Id. at 25-26.

Plaintiff filed a response to the order on November 14, 2005, only addressing one of the court's two concerns. That is, he described his unsuccessful efforts to serve defendants Bullock, Gerard and Smith, but did not address the court's notice that it intended to dismiss the action under Rule 12(b)(6).

Having considered the matter and the plaintiff's response, the court now dismisses the action as against the remaining four defendants because the first amended complaint fails to state a claim upon which relief may be granted. The dismissal is without leave to amend. There is no reason for this action to remain open indefinitely for Phelps to attempt to cure serve process service of process problems that may never be resolved in light of the fact that the claims against those unserved defendants have the same problems -- i.e., they are barred by Heck v. Humphrey, 512 U.S. 477 (1994), the collateral estoppel doctrine, and the statute of limitations -- that led the court to dismiss the action against other defendants. Because the court has dismissed the first amended complaint for failure to state a claim upon which relief may be granted, the court need not decide whether plaintiff has shown cause for his failure to accomplish service of process on defendants Gerard, Bullock and Smith.

The action is now terminated as to all defendants. Judgment will be entered against plaintiff and in defendants' favor. The clerk shall close the file.

IT IS SO ORDERED.

DATED: December 21, 2005

/s/
Marilyn Hall Patel
United States District Judge

APPENDIX G

OCT 24 2005
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS, No. C 04-2815 MHP (pr)

Plaintiff, **JUDGMENT**

v.

ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH; et al.,

Defendants.
_____/

The complaint is dismissed without leave to amend and this action is dismissed with prejudiced as to defendants American Civil Liberties Union, Anti-Defamation League of B'Nai B'Rith, Bureau of Alcohol, Tobacco and Firearms, City of San Francisco, Federal Bureau of Investigation, Diane Feinstein, and San Francisco Police Department.

IT IS SO ORDERED.

DATED: October 24, 2005

/s/
Marilyn Hall Patel
United States District Judge

APPENDIX H

OCT 24 2005
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COY PHELPS, No. C 04-2815 MHP (pr)

Plaintiff, **ORDER**

v.

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH; et al.,

Defendants.
_____/

INTRODUCTION

This action is now before the court for consideration of several defendants' motions to dismiss the first amended complaint. Also before the court for consideration are several motions filed by plaintiff. For the reasons discussed below the court will dismiss the first amended complaint without leave to amend, enter judgment in favor of the parties moving for dismissal, and deny plaintiffs several motions..

BACKGROUND

Coy Phelps is an insanity acquittee currently in custody at the Federal Medical Facility in Ayer, Massachusetts. He was accused in 1985 of bombing three Jewish facilities, the Black Studies Department at San Francisco State University, and an office of the Humanist Party. Phelps was found not guilty only by

reason of insanity in a 1986 trial for the crimes. See United States v. Phelps, Case No. CR 85-899 MHP (hereinafter "Phelps, No. CR 85-899"). He remained in custody until 1999, when he was conditionally released by order of this court. He was returned to custody in 2001. When Phelps appealed and, among other things, claimed his 1999 release should not have been conditional, the Ninth Circuit Court of Appeals decided he should not have been released at all in 1999 in United States v. Phelps, 283 F.3d 1176 (9th Cir.), cert. denied, 536 U.S. 947, and cert. denied 537 U.S. 867 (2002). Phelps remains in custody.

Phelps epitomizes the frequent filer who plagues the courts and opponents with numerous and often duplicative actions. Although the number of state cases filed by Phelps has not been explored, a national federal case index shows Phelps as a party (almost always a plaintiff or petitioner) in 168 federal cases. Phelps has not complained about 168 different problems; rather, most of his litigation is repetitive and usually stems from his extreme hatred of Jews, his belief that he should not be in custody, or some combination of those two points. This is another case of that kind.

A. The First Amended Complaint

Phelps alleges in this action that there is a massive Jewish conspiracy engaged in various actions that have violated numerous laws, there were extensive efforts to frame him for the 1985 bombings, and there were Jewish racketeering enterprises extorting money from businesses to put kosher and other Jewish symbols on their products and that the extorted money was funneled to Israel and back and forth between Israel, the ADL, the FBI and ATF.

1. The Alleged Conspiracy To Frame Phelps

Phelps alleges that "[t]hroughout his imprisonment, Phelps continued to maintain his innocence and

asserted that he was being framed in an international Jewish conspiracy."

First Amended Complaint ("FAC") at 7. He alleges that he eventually stopped trying to show his innocence until 1992, when proof of his innocence became available. In 1992, the San Francisco District Attorney raided the offices of the ADL and confiscated all its records. Those records allegedly showed that Phelps was innocent of the bombings and that a dossier had been prepared on him showing he had been targeted by various entities. FAC at 8-10.

Phelps alleges that he received inadequate care in custody because he was believed to be delusional rather than innocent. Phelps further alleges that eventually he was cared for by better doctors, i.e., psychiatrist Jean Zula and psychologist Mark Hazelrigg. Phelps alleges that Dr. Hazelrigg "saw the evidence that Phelps was actually innocent of the 1985 crimes and that the claim of Phelps being framed in [an] international conspiracy was not a delusion after all. Hazelrigg and Zula (Psychiatrist) immediately reported to the court in March of 1997) that Phelps should be released." FAC at 12. The allegations regarding Dr. Hazelrigg and Dr. Zula bump into the reality that the court's records show that Phelps at least misstates the facts.[1]

2. The Release And Re-Commitment Of Phelps

Phelps alleges that he was released on criminal probation conditions in January 1999 but then was improperly taken back into custody in 2001. FAC at 13-14. Phelps further alleges that the Ninth Circuit required by a 2002 decision that "[t]here must be a formal college type diploma (certificate) showing that Phelps had graduated (recovered)." FAC at 15. This mischaracterizes the Ninth Circuit's decision, especially insofar as Phelps asserts that it is purely a formality (i.e., the "minor technicality" of the absence

of a "college type diploma") that keeps him in custody. Cf. Phelps, 283 F.3d at 1184-86.

3. The Alleged Jewish Food Tax Extortion

Phelps alleges that there are thousands of "Jew Zionist organizations in the United States that are criminal racketeering enterprises which collects billions of dollars annually." FAC at 16. He alleges that the organizations extort money from manufacturers by demanding money for each item manufactured in exchange for putting certain marks on the goods indicating the product is kosher or meets some other religious dietary requirements. FAC at 17. The manufacturers charge more to consumers to account for the payment to these entities. Id. The funds collected are used to finance various activities Phelps does not like. Evidence was presented at Phelps' trial in 1985 "to show that these racketeering organizations were Zionist organizations whose sole purpose was to collect money to support Zionism." Id. at 18-19. Some of the money from the food tax is "secretly returned to the United States to other Zionist racketeering organizations" such as some of the defendants and is used "to oppress and to persecute Christians (of which Phelps is a class member) and to destroy the Aryan culture (of which Phelps is a class member)" in violation of federal and state laws. Id. at 19-20.

4. Miscellaneous Other Allegations

Phelps alleges that in addition to the "'secret Jew food tax' criminal racket, the ADL, the ACLU and the Southern Poverty Law Center are criminal racketeering enterprises in and of themselves with an avowed purpose to destroy the Aryan Culture and the Christian religion." FAC at 20. He further alleges that the FBI, ATF and other law enforcement agencies have a history of surveilling, investigating and infiltrating Aryan Christian groups. Id. at 20.

Phelps alleges that Irv Rubin, a leader of the Jewish Defense League, was in San Francisco at the time the crimes were committed and had threatened Phelps' attorney for defending Phelps and promised to take action if Phelps was released. Id. at 25. In 2004, Phelps learned that Rubin had admitted to other inmates that he was in San Francisco in 1985 and may have been helping the case against Phelps. Id. at 26.

Phelps alleges he filed a FOIA request to the ATF and FBI in 2003 and "nothing in the paperwork sent to him revealed any information about the raid on the ADL and the evidence that showed that Phelps was actually innocent of the crimes. The FBI and the BATF either failed to keep their records current . . . or refused to disclose the exculpatory information to Phelps." Id. This allegedly harmed Phelps' constitutional rights "to be free of imprisonment unless he committed a crime." Id. Phelps alleges in a footnote that when he "discovered (in 1992) evidence of him being framed into prison he immediately filed a lawsuit against the ADL, Israel, etc. but due to circumstance beyond his control, he was allowed to withdraw the case without prejudice, so any statute of limitations are tolled." Id.

5. Causes Of Action Identified In First Amended Complaint

Phelps identifies seven causes of action in his FAC. The first cause of action is against the State of Israel for receiving money from criminal racketeering enterprises to destroy Aryan culture and the Christian religion, of which Phelps is a class member.

The second cause of action is against the FBI and ATF because their alleged failure to keep current and accurate records deprived Phelps of his liberty and ability to show his innocence of the 1985 crimes.

The third cause of action is against the ADL, which allegedly caused Phelps' false arrest and false imprisonment because he exercised his First Amendment rights.

The fourth cause of action is against former San Francisco Mayor Diane Feinstein who allegedly sent two police officers to threaten Phelps "to prevent him from exercising his First Amendment rights to express his sincerely held shared religious beliefs" and had him arrested because he thereafter published his church newsletter. FAC at 34.

The fifth cause of action is against Tom Gerard, Roy Bullock and Don Smith. It alleges that "Smith paid Gerard and Roy Bullock to commit the 1985 crimes to frame Phelps into prison." FAC at 35. It further alleges these defendants were working with other defendants and agents and had received funds from a criminal racketeering enterprise and federal agencies.

The sixth cause of action alleges that the ACLU and Southern Poverty Law Center are "criminal racketeering enterprises in and of themselves but which have knowingly and willingly received money" from Jewish organizations and entities "to promote Zionism and to destroy Aryan culture and the Christian religion by genocide" and by abuse of the judicial process. FAC at 35.

The seventh cause of action is against the San Francisco Police Department and alleges that it engaged in anti-Aryan and anti-Christian activity. FAC at 37.

B. The Pending Motions

The motions now before the court are: (1) the Federal Defendants' motion to dismiss (docket # 38), (2) the City Defendants' motion to dismiss (docket # 54), (3) the ADL's motion to dismiss (docket # 56), the ACLU's motion to dismiss (docket # 63), (4) Phelps'

motions for recusal (docket # 44, # 82), (5) Phelps' motion to disqualify the judge (docket # 82), (6) Phelps' motion for clarification (docket # 50), and (7) Phelps' motion for default judgment (docket # 61).

DISCUSSION

A. Legal Standards For Motions To Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim. A claim may be dismissed only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). When assessing the legal sufficiency of a plaintiff's claims, the court must accept as true all material allegations of the complaint and all reasonable inferences that may be drawn therefrom. Navarro, 250 F.3d at 732. Dismissal is proper under Rule 12(b)(6) "only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Id. at 732. The court must also liberally construe a pro se litigant's complaint. Conclusory allegations of law are insufficient to defeat a Rule 12(b)(6) motion. Lee v. County of Los Angeles, 250 F.3d 668, 679 (9th Cir. 2001). In deciding a Rule 12(b)(6) motion, the court may take judicial notice of facts that are not subject to reasonable dispute. Id. at 688-89 (discussing Fed. R. Evid. 201(b)). For example, the court may take judicial notice that documents have been filed in other cases but not that facts recited therein are true. The court need not accept as true allegations that contradict facts which may be judicially noticed by the court. See Mullis v. United States Bank. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987), cert. denied, 486 U.S. 1040 (1988). And although a Rule 12(b)(6) motion is usually not available to raise an affirmative defense, it may be used when the complaint contains allegations showing

a complete defense or bar to recovery, such as a statute of limitations problem. See Jablon v. Dean Witter & Co., 614 F.2d 677, 682 (9th Cir. 1980).

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the court. See, e.g., Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039-40 (9th Cir. 2003), cert. denied, 541 U.S. 1009 (2004). A Rule 12(b)(1) motion will be granted if the complaint, when considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction. Id. at 1039 n.2; Thornhill Publ'g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979).

B. The Motions To Dismiss

The range of claims Phelps can allege is hemmed in by these realities: (1) Phelps cannot contest here the determination that he made and planted the bombs in 1985, (2) Phelps has known of and been complaining about the alleged "secret food tax" since 1985, and (3) Phelps has known of and been complaining about the information allegedly obtained in a raid on the ADL offices since 1992 or 1993. The court will address the estoppel and timeliness problems with Phelps' claims before turning to the specific motions to dismiss because these problems have been raised by several different motions to dismiss.

1. Claims Based On Phelps' Alleged Innocence Are Dismissed

a. Many Claims Are Barred By Heck

Most of Phelps' claims relate to his 1985 crimes and his 1986 trial. Those claims are barred by two different doctrines. First, the Heck rule bars damages claims in civil rights actions that would imply the invalidity of the jury verdict or the decision to commit Phelps to federal custody as a result of the not guilty only by reason of insanity ("NGI") verdict. In Heck v.

Humphrey, 512 U.S. 477 (1994), the Supreme Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck, 512 U.S. at 486-87. Heck applies in cases brought under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), as well as cases under 42 U.S.C. § 1983. See Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996). When a prisoner seeks damages in a civil rights action, the district court must therefore consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the claim must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. Heck, 512 U.S. at 487.

Heck articulated the rule with regard to a conviction but it has been applied in many different contexts. These cases make it clear that Phelps cannot avoid the reach of Heck by arguing that his commitment as a result of the NGI verdict might not be the conviction or sentence or imprisonment mentioned by Heck. See, e.g., Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1140 (9th Cir. 2005) (Heck applies to detainees under an involuntary civil commitment scheme such as California's Sexually Violent Predator's Act); Ramirez v. Galaza, 334 F.3d 850, 857-59 (9th Cir. 2003), cert. denied, 541 U.S. 1063 (2004) (Heck would bar a challenge to disciplinary proceeding if it would necessarily accelerate his release on parole); Harvey v. Waldron, 210 F.3d 1008, 1014 (9th Cir. 2000) (Heck bars challenge to pending criminal case); Sheldon v.

Hundley, 83 F.3d 231, 233 (8th Cir. 1996) (Heck bars a claim of unconstitutional deprivation of time credits for prisoner); Jackson v. Vannoy, 49 F.3d 175, 177 (5th Cir.), cert. denied, 516 U.S. 851 (1995) ("Heck applies to proceedings which call into question the fact or duration of parole"); McGrew v. Texas Bd. of Pardons & Paroles, 47 F.3d 158, 161 (5th Cir. 1995) (Heck bars challenge to revocation of supervised release).

A decision in favor of Phelps on Phelps' claims that he was framed, falsely arrested or maliciously prosecuted would imply the invalidity of the jury verdict and Phelps' current placement in a federal facility as a result of that verdict. Heck therefore bars those damages claims, whether under 42 U.S.C. § 1983 or Bivens. Those causes of action will not accrue, if at all, until the verdict in Phelps' criminal case is set aside.

b. Collateral Estoppel Precludes Other Innocence-Based Claims

As to those claims not barred by Heck -- as may be the case with the claims that are not founded on § 1983 or Bivens, and those claims that are asserted against some non-government defendants -- the doctrine of collateral estoppel requires dismissal of claims premised on Phelps' assertion that he is innocent of the 1985 bombings.

Collateral estoppel, or issue preclusion, bars the relitigation of issues explicitly litigated and necessary to an earlier judgment. See Gospel Missions v. City of Los Angeles, 328 F.3d 548, 554 (9th Cir.), cert. denied, 540 U.S. 948 (2003). To foreclose relitigation of an issue under federal law: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated by the party against whom preclusion is asserted; and (3) the determination of the issue in the prior litigation must have been a critical and

necessary part of the judgment in the earlier action. See id.; Allen v. City of Los Angeles, 92 F.3d 842, 849 (9th Cir. 1996). The doctrine of collateral estoppel may be applied to issues litigated in an earlier criminal case. See id.; Richey v. United States Internal Revenue Serv., 9 F.3d 1407, 1411, 1413 (9th Cir. 1993) (plaintiff collaterally estopped in civil action by implicit finding in his earlier criminal trial). "'A prior conviction will estop a party from contesting in a later civil suit any element necessari8ly [sic] established in the criminal trial.'" Id. at 1410 (citation omitted).

Determining the scope of the issue preclusion requires an evaluation of what issues were actually decided at Phelps' 1986 trial, which can be done with reference to the verdict, the jury instructions, and the indictment. The jury was instructed that it had to decide guilt or innocence first and only if the jurors were "unanimously convinced beyond a reasonable doubt as to defendant's guilt [they] must then turn to the consideration of the defense of legal insanity." See ADL's Request For Judicial Notice, Ex. 3, Jury Instruction No. 24. The jury's verdict was marked "guilty" and "not guilty only by reason of insanity" as to each of the fourteen counts. See ADL's Request For Judicial Notice, Ex. 2. The verdict thus reflected that the jury had determined Phelps had committed each of the offenses but had also established that he was legally insane at the time of the acts. See ADL's Request For Judicial Notice, Ex. 2 and Ex. 3.

When viewed in light of the instructions given, the jury's NGI verdict thus establishes that the following facts were proven beyond a reasonable doubt.

1. Phelps knowingly made and possessed a firearm on or about May 14, 1985. (Counts 1 and 2.)[2] For these and the other making and possession counts, a firearm was "defined to include a

destructive device" and a "'destructive device' [was] defined as an explosive, incendiary or a bomb." See ADL's Request For Judicial Notice, Ex. 3, Jury Instructions 13, 14.[3]

2. Phelps knowingly made and possessed a firearm on or about July 1, 1985. (Counts 4 and 5.)

3. Phelps knowingly made and possessed a firearm on or about September 16, 1985. (This was the destructive device recovered at the Horwitz Family Education Center.) (Counts 7 and 8.)

4. Phelps knowingly made and possessed a firearm on or about September 16, 1985. (This was the destructive device recovered at the residence of Rabbi Traub). (Counts 10 and 11.)

5. Phelps knowingly made and possessed a firearm on or about September 16, 1985. (This was the destructive device recovered at the Humanist Party Office.) (Counts 12 and 13.)

6. Phelps maliciously attempted to damage or destroy by means of an explosive a building or real property used by San Francisco State University.[4] (Count 3.)

7. Phelps maliciously attempted to damage or destroy by means of an explosive the building or real property housing Congregation Adath Israel. (Count 6.)

8. Phelps maliciously attempted to damage or destroy by means of an explosive the building or real property housing the Horwitz Family Education Center. (Count 9.)

9. Phelps maliciously attempted to damage or destroy by means of an explosive the building or real property housing the Humanist Party Office. (Count 14.)

Any claim that cannot exist in harmony with these facts must be dismissed. The issue of whether he did the bombings was identical to the one alleged in the prior litigation, was actually litigated by Phelps, and the determination that Phelps did the bombings was a critical and necessary part of the criminal case judgment. As to the claims that may not be barred by Heck, Phelps is estopped from alleging that he was framed for the 1985 bombings by anyone and is estopped from alleging that he did not commit the 1985 bombings. He also is estopped from asserting any claim that implicitly requires a rejection of the determination that he committed the bombings in 1985.

2. Most of Phelps' Claims Are Time-Barred

Defendants argue that the court should dismiss the first amended complaint because the claims are time-barred as to events alleged by Phelps to have happened in the mid-1980s or early 1990s. Here, one must consider what limitations period applies, when the claims accrued, and whether the disabilities of imprisonment and insanity require tolling of the limitations period.

The court may grant the motion to dismiss based on the expiration of the limitations period "only if the assertions in the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." Pisciotta v. Teledyne Industries, Inc., 91 F.3d 1326, 1331 (9th Cir. 1996). See Jablon v. Dean Witter & Co., 614 F.2d at 682 (12(b)(6) dismissal where allegations in complaint showed the plaintiff failed to file action within the limitations period).

Section 1983 does not contain its own limitations period. The appropriate period is that of the forum state's statute of limitations for personal injury torts. See Elliott v. City of Union City, 25 F.3d 800, 802 (9th Cir. 1994). Because California has multiple statutes of limitations for different torts, the court borrows the general or residual statute for personal injury actions to use for a § 1983 action. See Silva v. Crain, 169 F.3d 608, 610 (9th Cir. 1999). The general residual statute of limitations for personal injury actions was the one year period set forth at California Civil Procedure Code § 340(3) (as it existed until 2002) and was the applicable statute in § 1983 actions.[5] See id. The same statute of limitations applies when the claims arising in California are brought under Bivens rather than § 1983. See Van Strum v. Lawn, 940 F.2d 406, 410 (9th Cir. 1991). The court must give effect to a state's tolling provisions. See generally Hardin v. Straub, 490 U.S. 536, 543-44 (1989).

a. The Accrual Of Phelps' Claims

A claim generally "accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." Elliott, 25 F.3d at 802 (citation and internal quotation marks omitted). Phelps' numerous filings in this and other cases show he actually knew of the injury and factual basis for his claims many years ago. Other than any claim as to which the Heck rule applies -- and therefore has not yet accrued -- Phelps' claims thus accrued long ago.

The claims concerning the alleged "Jew food tax racket" accrued no later than the time of his 1985 arrest or his 1986 criminal trial. The October 3, 1985 Order Of Detention in the criminal case recounted that a single sheet flyer was found attached to 3 of the 4 bombs Phelps planted and that documents were seized from Phelps' home. The flyer had printed in very large letters "STOP THE JEW FOOD TAX." One of

the documents seized from Phelps' home complained of the "secret food tax" that Jews had exacted by use of kosher and other marks on consumer products. See docket #7 in Phelps, No. CR 85-899, at 4-5 and Exs. 1 and 2. Phelps also asserts in this action that he knew of the "Jew food tax racket" as of the time of his trial in 1986: "The trial of Phelps revealed another fact. The Jew Prosecutor alleged that Phelps was motivated to bomb the Jews to 'stop the secret Jew Food Tax racket.'" July 21, 2005 Petitioner Response To Motions To Dismiss, at 6. Phelps further alleges that a witness testified at his 1986 trial that the money collected from over 16,000 racketeering enterprises would be funneled through local synagogues to Israel and some returned to the U.S. and the racketeers. Id. The claims concerning the food tax thus accrued no later than the time of trial in 1986.

The claims based on the information allegedly obtained from the raid on the ADL offices and some defendants' homes in 1992 accrued no later than February 1993 because Phelps asserts he knew of the injury and factual bases for the claims at that time. In his pro se motion to set aside, vacate and expunge judgment filed February 16, 1993 in his criminal case, Phelps wrote that the prosecutor obtained an indictment based on the information provided by confidential informant Roy Bullock and then withheld the facts relating to the informant, and "this information was not known to this petitioner until 2-9-93 when he read a newspaper article which had appeared in a leading San Francisco newspaper on 1-21-93." Docket # 323 in Phelps, No. CR 85-899. Filed with that motion on February 16, 1993, was a motion for a subpoena duces tecum to obtain information from at least 27 entities, most of which allegedly did not provide responses to FOIA requests satisfactory to Phelps.

Any claim based on the alleged conspiracy between the ADL and the prosecutor also accrued no later than November 8, 1993. In his pro se motion for proper housing filed November 8, 1993, Phelps wrote that Assistant U.S. Attorney Joel Levine was the prosecutor and was among the defendants in Phelps' 1993 civil action "alleging that he conspired with the Anti-Defamation League of B'Nai B'Rith to falsely imprison the defendant." Docket # 328 in Phelps, No. CR 85-899.

The pro se complaint filed in 1993 in Phelps v. Anti-Defamation League of B'Nai B'Rith, N. D. Cal. Case No. C 93-3785 BAC (hereinafter "Phelps' 1993 civil action"), includes many of the same allegations contained in the FAC in the present action, although the conspiracy alleged back then included a local television station and a few more actors. Phelps' 1993 complaint shows his knowledge at that time of the factual bases and injuries for the claims therein. The claims mentioned in the 1993 complaint accrued no later than 1993. The 1993 complaint was filed pro se and signed by Phelps. The defendants in the 1993 action included the ADL, the City and County of San Francisco, the San Francisco Police Department, the FBI, the U.S. Attorney, the State of Israel, Mossad, KGO television station, and Diane Feinstein. The 1993 complaint contains the same basic allegations as the present FAC: in 1992 it became known that the San Francisco Police Department had a unit conducting surveillance on white Christians who espoused anti-Jewish views, the ADL induced the San Francisco Police Department and the Mayor to put Phelps under surveillance (id. at 22-23), the U.S. government gives Israel billions of dollars and some money is funneled back to the U.S. through Mossad and then goes to the ADL to spy on people (id. at 25), Tom Gerard and Roy Bullock were connected to the ADL and conducted surveillance on Phelps (id. at 26-27), Phelps was threatened at the behest of Mayor Feinstein, the FBI,

and ADL with imprisonment if he said anything against Jews (id. at 30), the San Francisco District Attorney's office raided offices of Gerard and Bullock and the ADL and records obtained showed that Phelps had been under surveillance (id. at 32), Gerard, Bullock and Mossad were working together to falsely imprison Phelps (id. at 33), and Senator Feinstein had purchased war bonds from Israel (id. at 37.) Phelps alleged that his complaint and allegations were "derived from the information and evidence seized by the search warrant issued by various law enforcement agencies" against the ADL and its "secret operatives." Id. at 36. That 1993 case was dismissed without prejudice in 1995 for failure to timely serve process under Federal Rule of Civil Procedure 4(m).

b. Imprisonment

California recognizes imprisonment as a disability that tolls the statute of limitations when a person is "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term of less than for life." Cal. Civ. Proc. Code § 352.1(a). The tolling is not indefinite, however; the disability of imprisonment delays the accrual of the cause of action for a maximum of two years. See id. Thus, an inmate has three years to bring a § 1983 claim for damages in California, i.e., the regular one year period under section 340(3) plus two years' postponement due to the disability of imprisonment. The disability of imprisonment only delays the accrual of claims for damages under § 1983 and does not delay the accrual of claims for injunctive and declaratory relief under § 1983. See Cal. Civ. Proc. Code § 352.1(c).

Although Phelps emphatically asserts that he is not a prisoner in parts of his action, the court need not decide whether the tolling provision for imprisonment applies to him because it does not help him in either event. If Phelps was not a prisoner, the

tolling provision simply does not apply. If Phelps is assumed to have been a prisoner, the disability of imprisonment would have tolled the limitations period for a maximum of two years, but that is not enough to help Phelps because his claims are based on events he allegedly knew of as they occurred about 19 years ago (relating to his trial and bombings) and about 12 years ago (relating to the information obtained in the ADL office raid). Additionally, he would not be considered a prisoner for purposes of the statute when he was out on conditional release from January 4, 1999 until March 2001. Cf. Deutch v. Hoffman, 165 Cal. App. 3d 152, 155-56 (Cal. Ct. Ap. 1985) (no tolling during time plaintiff was on parole). Once Phelps was released from custody in January 1999, the tolling did not resume upon his return to custody.

c. Insanity

The second potentially applicable tolling provision is for the disability of insanity. California Code of Civil Procedure § 352(a) provides for tolling if the person is insane at the time the cause of action accrued. For purposes of the tolling provision, "the term 'insane' has been defined as a condition of mental derangement which renders the sufferer incapable of caring for his property or transacting business, or understanding the nature or effects of his acts." Hsu v. Mt. Zion Hospital, 259 Cal. App. 2d 562, 571 (Cal. Ct. App. 1968); cf. Feeley v. Southern Pac. Trans. Co., 234 Cal. App. 3d 949, 952 (Cal. Ct. App. 1991) (tolling proper for time during which plaintiff was in a coma immediately after the injury that gave rise to his cause of action); Snyder v. Boy Scouts of America, 205 Cal. App. 3d 1318, 1324 (Cal. Ct. App. 1988) (post-traumatic stress disorder does not count as "insanity" that tolls the limitations period). The disability of insanity must exist at the time the cause of action accrues in order to toll the limitations period. Cal. Code Civ. Proc. § 357. Under California law, once

Phelps' cause of action accrued and the statute began to run, no later disability would suspend it. Id.; Larsson v. Cedars of Lebanon Hosp., 97 Cal. App. 2d 704, 707 (Cal. Ct. App. 1950). A plaintiff cannot double-count the disabilities of imprisonment and insanity by claiming for example that he was insane and imprisoned at the same time or that one followed the other. See Rose v. Petaluma & Santa Rosa Ry. Co., 64 Cal. App. 213, 217 (Cal. Ct. App. 1923). "[I]t is a settled rule of construction that the exemption period cannot be extended by the connection of one disability with another; in other words, a succession of disabilities cannot be tacked upon the first disability so as to prevent the operation of the statute." Id.

Phelps is not entitled to tolling due to insanity for several reasons. First, he was determined to be competent to stand trial in 1986, a determination which is incompatible with a finding that he was then insane. See Docket # 82 in Phelps, No. CR 85-899 (minutes from April 4, 1986 hearing finding Phelps competent to stand trial). He is estopped from challenging that determination in this action. The determination that Phelps was competent to stand trial precludes tolling of the limitations period for the disability of insanity at that time for any claim that accrued at the time of trial. (At most, tolling for the disability of imprisonment would have given him an extra two years on the claims that accrued in 1986 when he was not insane, but that would mean the trial-related claims had to be filed by 1989.)

Second, Phelps' zealous litigation efforts -- he has filed over 150 actions filed in the last twenty years -- are wholly inconsistent with him being under the disability of insanity. To determine that he has been insane all along would essentially be determining that every court should have immediately rejected every filing as the work of an insane person who didn't know what he was doing. Moreover, if Phelps has been

under the disability of insanity since the 1980s, he has not shown that he no longer is insane; and if he is insane, he is not competent to bring this action and a guardian would be needed. See Fed. R. Civ. P. 17(c).

Phelps' insanity argument is contrary to the spirit of § 352. The fundamental purpose of § 352 is to protect potential plaintiffs who are physically or mentally incapable of bringing claims within the limitations period. See Hsu, 259 Cal. App. 2d at 572-74. The mountain of evidence the court can judicially notice that Phelps has been busily litigating in furtherance of the same agenda for two decades establishes that (if his claims are not the product of delusional thinking), Phelps is not one who has been incapable of managing his business and legal affairs for many years.

Third, even if one could say that Phelps' custody within a federal institution warrants tolling for the disability of insanity, Phelps was out of custody for more than two years --from January 1999 through March 2001 – and has pled facts wholly at odds with a claim of insanity during that time. Phelps pled that after he was conditionally released, he "established a computer consulting business and was accepted by the business community." FAC at 13. He also pled that he established a "Help Center" to give "assistance to the disadvantaged in the community." Id. In 2001, he attempted to establish a website. Id. Phelps' pleading in this case is consistent with his statements in his motion for unconditional release that he had been able to take care of himself since his release in January 1999: "Phelps is out of place at [the assisted living facility to which he had been sent]. He is relatively healthy. He provides everyday care for himself. He maintains good hygiene and grooming for himself He is educated, intelligent, rational, and is motivated to be productive, creative and ambitious. . . . [¶] While a resident at that facility, Phelps

completely managed his own affairs and was not under any supervision or care of anyone. He paid his own bills each month and ate his meals away from the facility. ... [H]e has been consistently responsible in paying his rent and other monthly bills." ADL's Request For Judicial Notice, Ex. 7 at 3-4. Although written in the third person, the motion was filed pro se and signed by Phelps. Phelps further wrote that he had submitted a plan/list of goals before he was released from custody, that his plan was approved by prison doctors and probation officers, and that he had completed the goals listed in the plan. Id. at 5. Among his goals were medical care, arranging for his own after-death care, and helping other people. Phelps stated that he had filed incorporation papers with the State of California to establish a business organization and was taking steps to set up his business. Id.

Fourth, Phelps' argument that he is entitled to the tolling of insanity is wholly at odds with his contention elsewhere that he must be released unconditionally on the grounds that he has no mental illness.[6] Phelps has repeatedly urged in this and other actions that he never had and no longer suffers from any mental illness.[7] Any determination that Phelps is not entitled to release under 18 U.S.C. § 4243 is not a determination that he fits the definition of insanity for purposes of statutory tolling. Compare United States v. Phelps, 283 F.3d at 1182 (at hearing to obtain release under § 4243, the person "has the burden of proving by clear and convincing evidence that his release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect") with Hsu, 259 Cal. App. 2d at 571 (for tolling purposes, "the term 'insane' has been defined as a condition of mental derangement which renders the sufferer incapable of caring for his property or transacting business, or understanding the nature or effects of his acts").

Finally, Phelps contends that the clock stopped ticking on the limitations period by virtue of Phelps 1993 civil action. He errs. The dismissal of that action under Federal Rule of Civil Procedure 4(m) did not permanently stop the clock. Neither Rule 4 nor the order of dismissal indicated that the limitations period was tolled. Cf. Mann v. American Airlines, 324 F.3d 1088, 1090 (9th Cir. 2003) (failure to serve process on a timely-filed complaint within the limitations period does not cause the limitations period to start to run again unless and until the district court dismisses the action).

C. Federal Defendants' Motion To Dismiss

Phelps asserts claims against the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives (collectively the "Federal Defendants") in his second cause of action. He alleges the following: San Francisco District Attorney Arlo Smith "discovered that Phelps was actually innocent of the 1985 crimes" and was the "victim of a international Jew conspiracy" he notified the U.S. Department of Justice, the FBI and ATF and these agencies "refused to keep their records current and accurate." FAC at 33. This, in turn, allegedly deprived Phelps of his liberty and deprived him of his ability to show his actual innocence. He further alleges that the FBI and ATF violated 5 U.S.C. § 552 and § 552a. Phelps seeks declaratory relief and damages.

The damages claims against the Federal Defendants based on the prosecution of and custody of Phelps are barred by Heck because, if Phelps prevailed on any of them, the validity of the NGI verdict would be called into question. To the extent the claims are not barred by Heck and therefore have accrued, the claims are barred by the doctrine of collateral estoppel because they arise out of the criminal charges, the criminal trial and Phelps'

confinement and therefore cannot be maintained in light of the NGI verdict. To the extent Phelps' pleading might be construed to assert claims concerning the 1999 conditional release and the 2001 return to custody, the propriety of those decisions cannot be challenged here again because of Heck and the collateral estoppel doctrine. Phelps has already litigated and lost the claims concerning the propriety of the 1999 conditional release and 2001 return to custody. See Phelps, 283 F.3d 1176.

The FAC also does not state a claim for relief under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act, 5 U.S.C. § 552a. The statutes appear to be mentioned as alternative legal bases for relief on what are basically the same facts: that the Federal Defendants' inadequate record-keeping caused Phelps to lose in his criminal case. See Phelps' Opposition Brief at 9. Moreover, any claim under the Privacy Act would be barred by the 2-year statute of limitations, 5 U.S.C. § 552a(g)(5), because any cause of action would have accrued in the mid-1980s or early 1990s.

The Federal Defendants' motion to dismiss is GRANTED. Leave to amend will not be granted because the Heck, collateral estoppel and untimeliness problems cannot be cured by amendment.

D. The City Defendants' Motion To Dismiss

Phelps' claims against the City and County of San Francisco, the San Francisco Police Department, and former San Francisco Mayor Dianne Feinstein (collectively, the "City Defendants") for acts in the 1980s are barred by the doctrine of collateral estoppel insofar as they are premised on his alleged innocence of the bombings. Moreover, the Heck rule bars damages claims that necessarily call into question the jury's verdict and his resulting commitment to custody, which most of Phelps' claims against the City

Defendants do. Additionally, claims against the City Defendants for acts occurring in the 1980s that have accrued are time-barred

The rest of Phelps' claims against the City Defendants fail to satisfy the case or controversy requirement of Article III of the U.S. Constitution because Phelps has not pled facts showing he has standing to sue. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). Phelps' allegations that the City Defendants are persecuting members of the Aryan culture and the Christian religion in general are not only delusional, but are pled as a sort of generalized grievance that Phelps claims is shared by a large class of citizens. This does not confer Article III standing on Phelps. See Diamond v. Charles, 476 U.S. 54, 62 (1986); Warth v. Seldin, 422 U.S. 490, 499 (1975).

The City Defendants' motion to dismiss is GRANTED. Leave to amend will not be granted because the Heck, collateral estoppel and untimeliness problems cannot be cured by amendment.

E. The ADL's Motion To Dismiss

Phelps' allegation that the ADL was responsible for Phelps' false arrest and imprisonment is barred by the doctrine of collateral estoppel. The jury verdict in Phelps' criminal trial establishes that he committed the bombings for which he was arrested, prosecuted and put in custody. Phelps cannot relitigate his guilt in this action, so his claim that the ADL framed him must be dismissed. The claim that the ADL framed Phelps must be dismissed for the independent reason that it is time-barred.

Phelps' RICO claim against the ADL also must be dismissed. The FAC alleged that the "ADL is a criminal racketeering enterprise that has used the

money received from the racketeering activities to destroy, by genocide, Aryan culture and the Christian religions." FAC at 33. The RICO claim is based primarily on the ADL's alleged framing of Phelps for the bombings but, as noted above, Phelps is collaterally estopped from re-litigating his guilt. In addition to the collateral estoppel problem, the RICO claim is time-barred because it was not filed within the 4-year limitations period that governs a RICO claim. See Pincay v. Andrew, 238 F.3d 1106, 1008 (9th Cir.), cert. denied, 534 U.S. 885 (2001). Phelps' "Objection" filed on September 1, 2005 (docket # 81) makes clear that the activity about which he complains occurred in 1985 when he was arrested. In addition to the collateral estoppel and statute of limitations problems, the RICO claim suffers from the pleading deficiency that Phelps has not adequately alleged a prohibited act involving a pattern of racketeering activity. See 18 U.S.C. §§ 1962, 1964.

The ADL's motion to dismiss is GRANTED. Leave to amend will not be granted because the Heck, collateral estoppel and untimeliness problems cannot be cured by amendment.

F. The ACLU's Motion To Dismiss

Phelps alleges that the ACLU and the Southern Poverty Law Center ("SPLC") are "criminal racketeering enterprises in and of themselves but which have knowingly and willingly received money that is proceeds of criminal racketeering enterprise . . . to promote Zionism and to destroy Aryan culture and the Christian religion by genocide in violation of §18 U.S.C. 1091 et seq. and by abuse of the judicial process (using a legitimate means to obtain a illegitimate result." FAC at 35 (errors in original).

As noted earlier, to the extent the claim concerns Phelps' 1985 bombings, Phelps is collaterally estopped from asserting any claim that he did not commit the bombings. And any such claim is time-

barred. Thus, the alleged "abuse of the judicial process" part of the claim must be dismissed and any part of the claim that is based on the "food tax" that Phelps has been complaining about since 1985 must be dismissed as untimely. Additionally, the allegation of genocide is a conclusionary allegation that is insufficient to state a claim for relief.

Lastly, Phelps does not show he has standing to bring any claim against the ACLU. His contention that defendants are "destroy[ing] the Aryan culture and Christian religion" is insufficient to show he has Article III standing to sue the ACLU. See Lujan v. Defense of Wildlife, 504 U.S. 555, 560 (1992); Valley Forge Christian College, 454 U.S. at 472, 474.

The ACLU's motion to dismiss is GRANTED. Leave to amend will not be granted because the collateral estoppel and untimeliness problems cannot be cured by amendment.

G. Phelps' Motions

1. Phelps' Recusal Motions

Recusal is the process by which a federal judge may be disqualified from a given case. Motions to recuse a district court judge fall under two statutes, 28 U.S.C. § 144 and § 455. Section 144 applies only to district court judges but section 455 applies to all federal judges.

Section 144 provides for recusal where a party files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against the party or in favor of an adverse party. The affidavit must state the facts and reasons for such belief. See 28 U.S.C. § 144. A judge finding the motion timely and the affidavits legally sufficient must proceed no further and another judge must be assigned to hear the matter. See id.; United States v. Sibla, 624 F.2d 864, 867 (9th Cir. 1980). If the judge finds the affidavits are not legally

sufficient, recusal is simply denied. See 28 U.S.C. § 144; United States v. $292,888.04 in U.S. Currency, 54 F.3d 564, 566 (9th Cir. 1995) (affidavit inadequate when based on mere conclusory allegations).

Section 455 provides broader grounds for disqualification, requiring a judge to disqualify herself in any proceeding in which her impartiality might reasonably be questioned. See 28 U.S.C. § 455(a). Unlike § 144, § 455 has no provision for referral to another judge; rather, the judge at whom the motion is directed must determine whether bias or prejudice is shown. See Sibla, 624 F.2d at 868. Recusal is appropriate where a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Yagman v. Republic Ins., 987 F.2d 622, 626 (9th Cir. 1993) (citation omitted).

Phelps filed two recusal motions in this case. In the first motion, filed on June 3, 2005, Phelps argued that the undersigned should be recused "because of unfairness, bias, and prejudice against the petitioner and his class." He did not attach a declaration or affidavit to that motion and did not present any evidence in support of his conclusory allegations of bias. The second recusal motion, filed on September 2, 2005, had attached a declaration entitled "affidavit." In the declaration, Phelps stated that the undersigned is biased against him because she is a "Zionist Jew."

Both recusal motions are DENIED. (Docket # 44 and # 82.) The first recusal motion was inadequate under § 144 because it was not accompanied by a declaration/affidavit, made only conclusory assertions, and was not served on opposing counsel. The first recusal motion was inadequate under § 455 for the same reasons.

The second motion was deficient under § 144 because the declaration makes only conclusory allegations of bias and is untimely, having been filed

more than a year after the action was filed and assigned to this judge. See Sibla, 624 F.2d at 868 (affidavit "is not legally sufficient unless it specifically alleges facts that fairly support the contention that the judge exhibits bias or prejudice directed toward a party").

The second motion also fails under § 455, which does not have a procedural mechanism but is self-enforcing. Under § 455, recusal is appropriate where a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Yagman, 987 F.2d at 626. Here, that hypothetical reasonable person knowing all the facts would know the following about the maker of the recusal motion: Phelps' many court filings express an extreme hatred of Jews, Phelps' filings evidence his belief that all persons who do not agree with his viewpoint disagree based only on their Jewish sympathies, Phelps planted pipe bombs at three Jewish facilities (plus two other sites) in 1985, Phelps has been institutionalized for most of the last twenty years following a jury's finding that he was not guilty only by reason of insanity, and Phelps has published materials expressing his extreme hatred of Jews. That hypothetical reasonable person would also know that Phelps has never had the jury verdict or order of commitment set aside despite numerous efforts to do so, Phelps has filed over 150 actions in federal courts in the last two decades and has prevailed in very few (if any) of those actions filed in various district and appellate courts and handled by various judges, and that the court records flatly contradict Phelps' assertions regarding Dr. Hazelrigg's alleged statement that Phelps is innocent. That hypothetical reasonable person also would know that Phelps has not identified a single actual statement of bias but instead can identify only judicial rulings and relies on the faulty logic that repeated adverse rulings must flow from bias. Knowing all those facts and

reading Phelps' recusal motion would not cause that reasonable person to conclude that the judge's impartiality reasonably could be questioned.

2. Phelps' Motion For Clarification

Phelps' motion for clarification asks whether the court is "allowing the government to take two bites of the apple" is DENIED as moot because the government no longer urges Phelps is a "prisoner" for purposes of 28 U.S.C. § 1915A. See Federal Defendants' Reply Brief, p. 2 n.1.

3. Phelps' Motion For Default Judgment

The motion for default judgment against the State of Israel is DENIED as premature. (Docket # 61.) Federal Rule of Civil Procedure 55(b) contemplates that a default judgment may be sought after default has been entered against a defendant. See also New York Life Ins. Co. v. Brown, 84 F.3d 137 (5th Cir. 1996) ("After defendant's default has been entered, plaintiff may apply for a judgment based on such default. This is a default judgment."); Lee v. Brotherhood of Maintenance of Way Employees, 139 F.R.D. 376, 380 (D. Minn. 1991). Plaintiff has not properly sought entry of default and the clerk has not entered default against the State of Israel.

H. The Defendants Who Have Not Been Served and/or Have Not Appeared

Motions to dismiss were received from all but four defendants. Despite the fact that this case is now more than a year old, it appears that service of process still has not been accomplished as to at least defendants Roy Bullock, Tom Gerard and Don Smith. Phelps has not yet submitted an adequate proof of service showing that the summons and complaint has been served on those three defendants. Phelps' motion for default judgment suggests he believes he has served process on the State of Israel, but the adequacy

of that service is not before the court at this time. Two problems exist with regard to these four defendants.

First, it appears that the court's rulings in this order applies with equal force to the claims asserted against the four non-appearing defendants. Specifically, (a) claims concerning the arrest, prosecution and trial of Phelps appear to be barred by Heck, the collateral estoppel doctrine and the statute of limitations and (b) claims concerning information obtained in 1992 or 1993 from the raid on the ADL offices and defendants' residences appear to be barred by Heck and the collateral estoppel doctrine insofar as they allegedly show Phelps' innocence of the bombing and by the statute of limitations. The court may sua sponte dismiss a complaint for failure to state a claim as long as the plaintiff is given notice and an opportunity to be heard before the court does so. See Wachtler v. County of Herkimer, 35 F.3d 77, 82 (2d Cir. 1994). The court now gives that notice: the court intends to decide with regard to the four non-appearing defendants whether the complaint may be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Phelps must file and serve any opposition or other response no later than **December 2, 2005**, showing why the complaint should not be dismissed as to the State of Israel, Roy Bullock, Tom Gerard and Don Smith.

Second, it appears that service of process has not been accomplished as to defendants Bullock, Gerard and Smith. Federal Rule of Civil Procedure 4(m) contemplates that service of process will occur within 120 days of the filing of the complaint, and it is now far more than 120 days since the filing of the complaint or the first amended complaint. The court now gives plaintiff notice of the court's intent to dismiss under Federal Rule of Civil Procedure 4(m) for failure to serve process on these three defendants and to provide an opportunity for plaintiff to be heard on

the matter. Phelps must show cause why defendants Bullock, Gerard and Smith should not be dismissed from this action due to his failure to serve the summons and first amended complaint on each of these defendants as required by Rule 4(m) of the Federal Rules of Civil Procedure. Phelps' response must be in writing and must be filed and served no later than **December 2, 2005**. Phelps should explain each and every effort he made to serve process on each of these three defendants, each date on which he made those efforts and explain why he has not been successful in serving process on these three defendants. If he believes he has correctly served process on these three defendants, he must submit evidence that proves such service. Failure to file and serve a response by the deadline will result in the dismissal of those three defendants from this action.

CONCLUSION

For the foregoing reasons, the Federal Defendants' motion to dismiss is GRANTED, the City Defendants' motion to dismiss is GRANTED, the ADL's motion to dismiss is GRANTED, and the ACLU's motion to dismiss is GRANTED. (Docket #38, #54, #56, and #63.) Because plaintiff will not be given leave to amend his first amended complaint against the moving defendants, the court will now enter judgment in their favor and against plaintiff.

Plaintiffs recusal motions, motion for clarification and motion for default judgment are DENIED. (Docket #44, #50, #61, and #82.)

No later than **December 2, 2005**, plaintiff must file and serve any opposition/response to the court's intent to sua sponte determine whether the first amended complaint states a claim for relief against any of the non-appearing defendants. And no later than **December 2, 2005**, plaintiff must file and serve

his response regarding service of process on defendants Gerard, Smith and Bullock.

IT IS SO ORDERED.

DATED: October 24, 2005

/s/
Marilyn Hall Patel
United States District Judge

ENDNOTES

1. Docket # 352 in Phelps, No. CR 85-899, is a September 18, 1996 Annual Forensic Update signed by Mark Hazelrigg, Ph.D., a clinical psychologist in the mental health division at FCI Butner, North Carolina, and Jean Zula, M.D., a staff psychiatrist at that facility. The Update does not state that Phelps did not commit the offenses. The only statement that comes anywhere close to that topic is a statement that the determination that Phelps' claims of being followed and surveilled were perhaps not delusional. The Update stated that Phelps' diagnoses on Axis I of the DSM-IV were: "1) Schizophrenia, Paranoid Type, in partial remission, 295.30 (Primary Diagnosis)" and "2) Pedophilia by History, 302.20." Update at 4. After those diagnoses, the following is stated in the "impressions" portion of the Update:

> Past documentation provides evidence of the above diagnoses, specifically a psychotic disorder that takes the form of delusions regarding conspiracies and association with extreme religious organizations. Mr. Phelps' behavior has been even more extreme than other members of these radical groups, as exemplified by the current offense in this case. In addition, he has shown numerous associated symptoms of Schizophrenia, particularly social maladjustment, flat affect, apathy, and social isolation. In the past year, additional information about some of Mr. Phelps' claims of being followed and subjected to illegal surveillance was obtained, calling into question the extent of his delusions and psychotic symptoms. He remained excessively concerned about others' activities and

> suspicious about their motives. Whether these beliefs constitute paranoid delusions or reflect a Paranoid Personality Disorder will require further assessment.
>
> Mr. Phelps remains in need of inpatient hospitalization. Although he has made significant changes in the last year, he has not fully met the treatment goals. Some of his beliefs continue to be so extreme as to appear delusional and he remains impaired in his social relationships.

Id. (emphasis added). At most, the Update stated that Phelps might not be delusional about having been followed and surveilled. The Update in no way suggested that there was evidence that Phelps did not commit the bombings that prompted his commitment following the NGI verdict. The same information regarding Phelps being followed appeared in the September 25, 1997 and August 5, 1998 annual reports authored by Dr. Zula and Dr. Hazelrigg. See docket # 391 in Phelps, No. CR 85-899, sealed exhibits F and G. Like the 1996 Update, neither the 1997 nor the 1998 Annual Reports suggested that there was evidence that Phelps did not commit the bombings.

The court takes judicial notice that these documents were filed in Phelps, No. CR 85-899. The documents show the baseless nature of Phelps' present allegation that Dr. Hazelrigg reported to the court that Phelps was innocent of the bombings.

2. For Counts 1, 4, 7, 10, and 14, the jury also had to find that Phelps did not file with the Secretary of the Treasury a written application to make and register a firearm. See ADL's Request For Judicial Notice, Ex. 3 (Jury Instruction No. 13). For Counts 2, 5, 8, 11, and 13, the jury also had to find that the

firearm was not then registered to the defendant in the National Firearms Registration and Transfer Record. See ADL's Request For Judicial Notice, Ex. 3 (Jury Instruction No. 14).

3. The court takes judicial notice under Federal Rule of Evidence 201 that the documents attached as exhibits to ADL's request for judicial notice are documents filed in Phelps' criminal case.

4. The instructions for Counts 3, 6, 9, and 14 also required the jury to find elements showing a federal jurisdiction for the crimes. The jury found that San Francisco State University received federal financial assistance at or during the time of Phelps' act in Count 3. The jury found that the building or real property housing Congregation Adath Israel was used in an activity affecting interstate or foreign commerce at or during the time of Phelps' act in Count 6. The jury found that the building or real property housing the Horwitz Family Education Center was used in an activity that affected interstate or foreign commerce at or during the time of Phelps' act in Count 9. The jury found that the building or real property housing the Humanist Party Office was used in an activity that affected interstate or foreign commerce at or during the time of Phelps' act in Count 14.

5. In 2002, the California Legislature changed the residual limitations period to two years. See Cal. Code Civ. Proc. § 335.1. The extension became effective on January 1, 2003. See Maldonado v. Harris, 370 F.3d 945, 954 (9th Cir. 2004). That change in the law does not matter here because Phelps' claims were time-barred long before January 1, 2003.

6. Phelps' contention that he should receive equitable tolling for insanity while arguing here and elsewhere that he is not insane also may be barred by the judicial estoppel doctrine. Factors which may be considered in determining whether judicial estoppel should be imposed include (1) whether the party's

later position is clearly inconsistent with its earlier position, (2) whether "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,'" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001). These factors are not "inflexible prerequisites or an exhaustive formula." Id. at 751. The court will not decide whether judicial estoppel does apply here because it would an inquiry that is not necessary in light of the numerous other reasons to find that the insanity tolling provision does not apply to Phelps.

7. For example, in his efforts to obtain release from custody, Phelps has filed numerous motions and petitions in which he wrote that he either never was mentally ill or no longer was mentally ill. See, e.g., Phelps' handwritten motion for release filed June 23, 1994 in which he states "Phelps alleges he is no longer mentally ill and no longer dangerous and seeks release from custody. Docket #339 in Phelps, No. CR 85-899, p. 2.